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No.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

CATHLEEN L. MURPHY, STAFF SERGEANT,
UNITED STATES AIR FORCE, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

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October 1994

QUESTION PRESENTED

Whether the failure of petitioner's commander to advise her of her rights under Article 31, U.C.M.J. (which rights are coextensive with petitioner's rights under the Fifth Amendment to the United States Constitution) before questioning her regarding allegations of drug use tainted petitioner's subsequent consent to a urinalysis so that the results of the urinalysis should be excluded from evidence under the Fourth Amendment to the United States Constitution?

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UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

PETITION FOR WRIT OF CERTIORARI

The petitioner, Cathleen L. Murphy, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Military Appeals entered in her case on 20 July 1994.

OPINIONS BELOW

The decision of the United States Court of Military Appeals, *United States v. Murphy,* 39 MJ 486 (C.M.A. 1994) is reprinted at Appendix A. The decision of the United States Air Force Court of Military Review, *United States v. Murphy,* 36 M.J. 732 (A.F.C.M.R. 1992), *aff'd*, 39 M.J. 486 (C.M.A. 1994) is reprinted at Appendix B. The initial decision of the United States Court of Military

Appeals, *United States v. Murphy,* 33 M.J. 323 (1991) is reprinted at Appendix C. The initial decision of the United States Air Force Court of Military Review, *United States v. Murphy,* 29 M.J. 573 (A.F.C.M.R. 1989), *vacated,* 33 M.J. 323 (C.M.A. 1991) is reprinted at Appendix D.

JURISDICTION

The final order of the United States Court of Military Appeals was entered on 20 July 1994. The jurisdiction of this Court is invoked under 28 U.S.C.A. Section 1259(3) (West 1993) and 10 U.S.C.A. Section 867a (West Supp. 1994).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides, in pertinent part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated". The Fifth Amendment of the Constitution of the United States provides, in pertinent part, "nor shall [any person] be compelled in any criminal case to be a witness against himself."

STATEMENT OF THE CASE

In August 1987, petitioner was a United States Air Force security policewoman. Several months earlier petitioner's commander Captain Thomas had called petitioner in his office to discuss an allegation that she was involved with drugs. *See United States v. Murphy,* 36 M.J. 732, 733 n.4 (A.F.C.M.R. 1992), *aff'd,* 39 M.J. 486 (C.M.A. 1994). This allegation was apparently treated as unfounded; petitioner continued with her law enforcement duties. *See Murphy,* 36 M.J. at 733 n.4. On 17 August 1987, an AFOSI (Air Force Office of Special Investigations) agent

told the security police superintendent, Senior Master Sergeant Spahr, that an informant had seen petitioner at the Fast and Cool Club the previous Saturday night with a civilian named Tonya or Tina and that petitioner had used drugs. *United States v. Murphy,* 39 M.J. 486, 487 (C.M.A. 1994). The AFOSI requested petitioner's commander, Captain Thomas, to ask petitioner three questions about the alleged incident. *Id.* Captain Thomas called petitioner at her home and left a message on her answering machine asking her to call his office. *Id.* Petitioner returned Captain Thomas' call 19 August 1987 and arranged to meet with him after drawing her weapon but before reporting to duty on 20 August 1987. *Id.* The United States Air Force Court of Military Review determined that petitioner had a military duty to appear. *See Murphy,* 36 M.J. at 734.

Petitioner reported formally, by standing at attention in front of Captain Thomas' desk and saluting. *See id.* Petitioner's supervisor, MSgt Holiman, was also present. *See Murphy,* 36 M.J. at 733 and *Murphy,* 39 M.J. at 487. Without warning petitioner of her rights pursuant to Article 31(b), U.C.M.J. (Uniform Code of Military Justice), 10 U.S.C. Section 831(b) (1988), Captain Thomas informed her he was going to ask her some questions regarding her whereabouts the previous Saturday night. *See Murphy,* 39 M.J. at 487. Captain Thomas asked petitioner where she was then, and she said at the Fast and Cool Club. *Id.* He then asked petitioner who she was with, and she said Tonya or Tina. *Id.* Captain Thomas asked who Tonya or Tina was, and petitioner said a civilian whom she had met. *Id.*

Captain Thomas then told petitioner there was an allegation she had used drugs, and asked if she was willing to give a urine sample. *Id.* Petitioner said she was willing to give a sample and completed and signed a consent to

search form. *Id.* Master Sergeant Holiman accompanied petitioner to the base hospital, where she provided a urine sample which tested positive for cocaine. *See Murphy,* 36 M.J. at 733.

Petitioner was tried and convicted by a general court-martial composed of officer members of wrongful use of cocaine in violation of U.C.M.J. Article 112a, 10 U.S.C. Section 912a (1988). *Murphy,* 36 M.J. at 732. She was sentenced to a bad conduct discharge, confinement for two years, and reduction to the lowest enlisted grade. *Id.* The convening authority approved the sentence as adjudged. *Id.*

The United States Air Force Court of Military Review affirmed the findings and approved a sentence of a bad conduct discharge, confinement for fifteen months, and reduction to the lowest enlisted grade. *United States v. Murphy,* 29 M.J. 573 (A.F.C.M.R. 1989), *vacated,* 33 M.J. 323 (C.M.A. 1991). On appeal to the United States Court of Military Appeals, the Court returned the case to the United States Air Force Court of Military Review for determination of the instant issue. *See United States v. Murphy,* 33 M.J. 323 (C.M.A. 1991).

On remand, the United States Air Force Court of Military Review held that the failure of petitioner's commander to give her U.C.M.J. Article 31 warnings did not affect the voluntariness of her consent to a urinalysis. *United States v. Murphy,* 36 M.J. 732 (A.F.C.M.R. 1991), *aff'd* 39 M.J. 486 (C.M.A. 1994). The court noted there is no requirement that a suspect be informed of her Article 31 rights before being asked to consent to a search. *See Murphy,* 36 M.J. at 735. The court further noted that there was no evidence in the record to indicate that petitioner's decision to consent to the search was influenced by her responses to petitioner's questions. *See id.* at 735-736.

Senior Judge Leonard filed a dissent holding that petitioner's consent was not shown to be voluntary by clear and convincing evidence. *See United States v. Murphy,* 36 M.J. 732, 736 (A.F.C.M.R. 1992) (Leonard J., dissenting), *aff'd,* 39 M.J. 486 (C.M.A. 1994).

The United States Court of Military Appeals held that there was " 'clear and convincing evidence' " that petitioner consented to the urinalysis and that the Military Judge did not err in admitting evidence of the urinalysis. *See United States v. Murphy,* 39 M.J. 486, 489 (C.M.A. 1994). The court affirmed the decision of the United States Air Force Court of Military Review on further review. *See id.* at 489.

REASON FOR GRANTING THE WRIT

CONSIDERATION OF THIS CASE WILL GIVE THIS HONORABLE COURT THE OPPORTUNITY TO DEFINE WHEN A CONSENSUAL SEARCH IS IRREMEDIABLY TAINTED BY THE QUESTIONING OF A SUSPECT WITHOUT ADVISING HIM OF HIS RIGHTS UNDER THE UNITED STATES CONSTITUTION, FIFTH AMENDMENT.

"No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial." U.C.M.J. Article 31(b), 10 U.S.C. Section 831(b) (1988). The protections of U.C.M.J. Article 31 are coextensive with the protections of the Fifth Amendment to the United States Constitution. *See* M.R.E.

(Military Rule of Evidence) 305(d)(1); *United States v. Ravenel,* 26 M.J. 344 (C.M.A. 1988); *United States v. Armstrong,* 9 M.J. 374, 380 (C.M.A. 1980); and *United States v. Eggers,* 3 U.S.C.M.A. 191, 195, 11 C.M.R. 191, 195 (1953). "To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances . . . . *Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.*" Military Rule of Evidence 314(c)(4) (emphasis added). *See also Bumper v. North Carolina,* 391 U.S. 543, 548 (1968) and *United States v. White,* 27 M.J. 264, 265 (C.M.A. 1988) (government must prove consent freely and voluntarily given). "Consent must be shown by clear and convincing evidence." Military Rule of Evidence 314(c)(5). In determining whether consent is voluntary, this Court should examine the totality of the circumstances. *See Schneckloth v. Bustamonte,* 412 U.S. 218, 227 (1973); *United States v. Frazier,* 34 M.J. 135, 137 (C.M.A. 1992); *United States v. Goudy,* 32 M.J. 88, 90 (C.M.A. 1991).

The goal of the exclusionary rule of the Fourth Amendment to the United States Constitution "is to deter unreasonable searches". *See Oregon v. Elstad,* 470 U.S. 298, 306 (1985). In determining whether evidence obtained after an unconstitutional search and seizure is sufficiently attenuated from the original delict to be admissible, this Court has examined such factors as the lapse of time from the original wrong (*see Wong Sun v. United States,* 371 U.S. 471 (1963); *Brown v. Illinois,* 422 U.S. 590 (1975), and *United States v. Ceccolini,* 435 U.S. 268 (1978)); strictness of the custodial conditions (*see Rawlings v. Kentucky,* 488 U.S. 98 (1980)); the presence of intervening events (*see Wong Sun v. United States; Brown v. Illinois;* and *Johnson v. Louisiana,* 406 U.S. 356 (1972)); and the purpose and flagrancy of the unconstitutional conduct (*see Brown v. Illinois; United States v. Ceccolini;* and *Dunaway v. New York,* 422 U.S. 200 (1979)). *See generally* David A. Klein,

When Is Evidence Which Is Obtained After Unconstitional Search or Seizure Sufficiently Remote From Such Search or Seizure So As Not To Be Tainted By, And Not To Be Inadmissible As Fruit Of, Such Search or Seizure—Supreme Court Cases, 109 L.Ed.2d 787.

From the perspective of effectuating the goal of the Fourth Amendment exclusionary rule (deterring unlawful police conduct), the circumstances of this case are disturbing. The Air Force Office of Special Investigations had received information that petitioner had used drugs at a particular time and place, and that petitioner had been with a particular individual. The AFOSI asked petitioner's commander, the *Security Police Commander*, to ask petitioner questions which might confirm the information they had been given. Petitioner was asked to report to her commander's office. Captain Thomas testified that he considered the request to come and see him an order for appellant to report to his office. *See United States v. Murphy,* 36 M.J. 732, 736 (A.F.C.M.R. 1992)(Leonard J., dissenting), *aff'd,* 39 M.J. 486 (C.M.A. 1994). Petitioner reported directly before going on duty (no doubt, in uniform) by saluting her commander and standing at attention in front of his desk. Her supervisor was also present. Both her supervisor and her commander outranked petitioner. Petitioner knew she could not leave until allowed to leave by her commander. *See Murphy,* 36 M.J. at 736 (Leonard J., dissenting). Without advising her of her rights under Article 31, U.C.M.J., 10 U.S.C. Section 831 (1988), petitioner's commander then asked her questions which confirmed the specifics of the allegation. These responses also affirmed her commander's continued suspicion of petitioner – Captain Thomas testified that if petitioner's responses had not confirmed the information he was given, he would not have asked petitioner to consent to a urinalysis. *See Murphy,* 36 M.J. at 738 (Leonard J., dissenting). Petitioner's

commander then told petitioner there was an allegation she had used drugs, and asked if she was willing to give a urine sample. *See United States v. Murphy,* 39 M.J. 486, 487 (C.M.A. 1994). Neither Captain Thomas nor MSgt Holiman told petitioner she could refuse to consent. *See Murphy,* 36 M.J. at 739 (Leonard J., dissenting).

Consider petitioner's state of mind when she was asked to consent to the urinalysis. She had been ordered to report to her commander's office; present are her commander (a Captain) and her supervisor (a Master Sergeant). Contrary to her security police training, she has been questioned regarding allegations of drug use *without rights advisement by her security police commander,* which no doubt contradicted petitioner's training and experience in police matters. This was the second time in several months in which petitioner had been questioned regarding allegations of drug involvement. Assuming, for argument's sake, that the allegation was true, her commander had just asked questions which would have clearly indicated to her that he had knowledge of facts corroborating her drug use. It was likely abundantly clear to petitioner that (1) her consent was immaterial under the circumstances and (2) since her commander had failed to follow police procedure and constitutional dictates in questioning her without rights advisement, that the rules regarding consent may have gone out the window as well. If her security police commander and supervisor, the individuals responsible for petitioner's training in proper procedure, and the individuals responsible for ensuring that proper procedures were followed, did not follow the proper procedure in questioning her regarding the allegations, what reason did petitioner have for believing that the proper procedures for a consensual urinalysis would be followed?

It is particularly important to consider that these events took place in a military context, more specifically, a security police squadron, in which the dictates of command and authority are even more important than in the Air Force as a whole. "Because of the effect of superior rank or official position upon one subject to military law, the mere asking of a question under certain circumstances is the equivalent of a command." *United States v. Gibson,* 3 U.S.C.M.A. 746, 752, 14 C.M.R. 164, 170 (1954). Due to military training, a member may feel compulsion to say what he thinks his superior wishes her to say. *See United States v. Armstrong,* 9 M.J. 374, 378 (C.M.A. 1980). This rationale applies as well to a request to consent to a urinalysis.

With regard to the factors upon which this Court has focussed in analyzing the taint of fourth amendment violations, the United States cannot establish the voluntariness of petitioner's consent by clear and convincing evidence. There was no lapse of time from the unwarned questioning to the request for petitioner to consent to the urinalysis. *Cf. Brown v. Illinois,* 422 U.S. 590 (1975)(two hours). *Contra United States v. Wong Sun,* 371 U.S. 471 (1963)(several days from initial illegality until Wong Sun's statement). Petitioner had a military duty to appear before her commander and could not leave until permitted by him to do so. *But cf. Rawlings v. Kentucky,* 448 U.S. 98 (1980)(relaxed atmosphere; individuals joked with officers and offered them coffee or water). The only event which intervened between the unwarned questioning and the request for consent, the statement that someone had alleged that petitioner had used drugs, aggravated rather than lessened the coercive atmosphere. *See United States v. Murphy,* 36 M.J. 732, 738 (A.F.C.M.R. 1992)(Leonard J., dissenting), *aff'd* 39 M.J. 486 (C.M.A. 1994). *But see*

Wong Sun v. United States and *Johnson v. Louisiana,* 406 U.S. 356 (1972). Finally, the Fifth Amendment violation in this case was purposeful (planned and premeditated) and flagrant. *See Brown v. Illinois* and *Dunaway v. New York,* 442 U.S. 20 (1979). *But see United States v. Ceccolini,* 435 U.S. 268 (1978).

A fair and objective review of the facts of this case demonstrates that the United States has failed to produce clear and convincing evidence of the voluntariness of petitioner's consent to the urinalysis. *See United States v. Murphy,* 36 M.J. 732, 736 (A.F.C.M.R. 1992) (Leonard J., dissenting), *aff'd,* 39 M.J. 486 (C.M.A. 1994). "To find a free and voluntary consent we must be satisfied by *clear and convincing evidence* that subtle and implicit pressures of command have not overwhelmed the airman giving the consent." *Murphy,* 36 M.J. at 739 (Leonard J., dissenting) (emphasis in original) (citations omitted). The United States has failed to meet its burden of proof on this issue, to the substantial prejudice of petitioner. *See Murphy,* 36 M.J. at 739 and 739 n.15 (Leonard J., dissenting) (other evidence in case likely insufficient to establish petitioner's guilt beyond a reasonable doubt).

CONCLUSION

The taint arising from a Fifth Amendment violation as it affects a consensual search is an issue on which this Court and lower courts have had little to say. Requests for consensual urinalyses are common in the United States Air Force and positive urinalysis results often lead to a court-martial for the member. Therefore the fact situation presented by this case is relatively common (in its broad outlines) and of significant impact. In terms of effectuating the purposes of the Fourth Amendment exclusionary rule, this is a notable case as it involved relatively flagrant violations of a subordinate's Fifth Amendment rights by a security police commander. This case presents a classic opportunity for this Court to outline the extent of the taint arising from Fifth Amendment violations on requests for consensual searches and to clearly and forcefully indicate its disapproval of the purposeful and premeditated Fifth Amendment violation while vindicating petitioner's Fifth Amendment protections.

Respectfully submitted,

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OCTOBER 1994

APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 63,837.
CMR No. 27422.

UNITED STATES, APPELLEE,

v.

CATHLEEN L. MURPHY, STAFF SERGEANT,
U.S. AIR FORCE, APPELLANT.

Argued Feb. 1, 1994.
Decided July 20, 1994.

Accused was convicted by general court-martial, Mildred L. Raichle, J., of use of cocaine. The United States Air Force Court of Military Review, 29 M.J. 573, affirmed. Review was granted. The United States Court of Military Appeals, 33 M.J. 323, set aside and remanded. On further review, the United States Air Force Court of Military Review, 36 M.J. 732, held that commander's failure to give Article 31 warnings did not affect voluntariness of consent to search by urinalysis. The record was returned to the Court of Military Appeals. The United States Court of Military Appeals, Crawford, J., held that unlawful questioning of accused without required Article 31 warning did not preclude admissibility of consensual urinalysis results under the circumstances.

Affirmed.

For Appellant: *Captain Robert A. Parks* (argued); *Colonel Jay L. Cohen* (on brief); *Lieutenant Colonel Frank J. Spinner.*

For Appellee: *Lieutenant Colonel Thomas E. Schlegel* (argued); *Colonel Jeffrey Infelise* (on brief); *Major Barnard N. Madsen.*

Opinion of the Court

CRAWFORD, Judge:

Contrary to her pleas, appellant was convicted of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 U.S.C. § 912a. The convening authority approved the sentence of a bad-conduct discharge, 2 years' confinement, and reduction to the lowest enlisted grade. After the case was heard twice by the Court of Military Review [29 MJ 573 (1989) and 36 MJ 732 (1992)] and once by this Court [33 MJ 323 (1991)], the findings and sentence were affirmed. We specified the following issue for review:

> WHETHER THE [UNLAWFUL] QUESTIONING OF APPELLANT WITHOUT THE REQUIRED [ARTICLE 31] WARNING PRECLUDED ADMISSIBILITY OF THE [CONSENSUAL] URINALYSIS RESULTS.

For the reasons stated herein, we hold that the results of appellant's urinalysis were properly admitted into evidence.

FACTS

At the time of trial, appellant was a 30-year-old staff sergeant, on active duty for over 10 years, and all of which was in the security police field, including search and seizure. She was a senior security police supervisor per-

forming duties as a flight chief with responsibilities for training other security police officers. A high school graduate, appellant also took college level courses in law enforcement procedures.

On August 17, 1987, an Air Force Office of Special Investigations (OSI) agent told the security police superintendent, Senior Master Sergeant Spahr, that an informant had seen appellant at the Fast and Cool Club on the previous Saturday night using illegal drugs and in the company of a civilian woman named Tonya or Tina.

The OSI requested that appellant's commander, Captain Thomas, ask her three questions about the incident reported by the informant. Captain Thomas called appellant at home and left a message on her answering machine requesting her to call his office. She returned his call on August 19, 1987, and arranged to meet with Captain Thomas after drawing her weapon and before reporting for duty on the afternoon of August 20, 1987.

That afternoon she reported to Captain Thomas. Her supervisor, Sergeant Holiman, was also present. Without warning appellant pursuant to Article 31(b), UCMJ, 10 USC § 831, Captain Thomas informed her that he was going to ask her some questions regarding her whereabouts on the previous Saturday night. Captain Thomas first asked appellant where she was on Saturday night, and she said at the Fast and Cool Club. He then asked who she was with, and she said Tonya or Tina. Third, he asked who Tonya or Tina was, and she said a civilian female whom she had met.

After she answered the three questions, Captain Thomas told her there was an allegation she had used drugs, and he asked if she was "willing" to give a urine sample. She replied, "Yes." Because she was familiar with the consent-to-search form, she did not hesitate filling that

out. Appellant completed and signed a consent to search form that contained the following:

> I know that I have an absolute right to give my consent to a search. I understand that, if I do consent to a search, anything found in the search can be used against me in a criminal trial. . . . I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law.

Captain Thomas testified that there were "several [similar] allegations made daily" in this "particular field," thus he did not warn her until he found "some validity" to the allegations. Captain Thomas denied telling appellant, "If you do not consent to it, you will be given a command-directed urinalysis test." Captain Thomas also testified that she "was free" to "leave" the office.

We previously held that Captain Thomas was required to give Article 31 warnings prior to asking the three questions. 33 MJ at 329. The question we must now address is whether the consent to search was a fruit of the poisonous tree.

DISCUSSION

The term "fruit of the poisonous tree" doctrine was first used in *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 268, 84 L.Ed. 307 (1939). In *Nardone*, the Court indicated that it is not enough to show "a causal connection" between the original evidence and the derivative evidence because "[a]s a matter of good sense . . . such connection may have become so attenuated as to dissipate the taint." *Id.* at 341, 60 S.Ct. at 268. *See also* Mil.R.Evid. 304(e)(3), 311(a) and (e)(3), Manual for Courts-Martial, United States, 1984. The doctrine was further refined in *Wong Sun v. United States,* 371 U.S.

471, 487-88, 83 S.Ct. 407, 417-18, 9 L.Ed.2d 441 (1963), where the Supreme Court stated:

> We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light *but for* the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

(Emphasis added.)

In *Oregon v. Elstad,* 470 U.S. 298, 306, 105 S.Ct. 1285, 1291-92, 84 L.Ed.2d 222 (1985), the court stated: "The *Wong Sun* doctrine applies as well when the fruit of the Fourth Amendment violation is a confession." Since the standard as to consent is whether it was voluntary, we shall examine the analysis of *Elstad. Cf. United States v. Gonzalez-Sandoval,* 894 F.2d 1043, 1047-49 (9th Cir. 1990); *United States v. Sangineto-Miranda,* 859 F.2d 1501, 1515-19 (6th Cir.1988). In *Elstad* the Supreme Court declined to exclude an otherwise voluntary statement following an inadmissible statement obtained by the police. As the Court stated:

> We must conclude that, absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion. A subsequent administration of *Miranda* warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement. In such circumstances, the finder of fact may reasonably conclude that the

> suspect made a rational and intelligent choice whether to waive or invoke his rights.

470 U.S. at 314, 105 S.Ct. 1296.

As in *Elstad,* the crucial issue here is not whether the consent was a fruit of the inadmissible statement but rather, in *Elstad*'s terms, whether the "later confession" was voluntary. The Court rejected the state court view "that the unwarned remark compromised the voluntariness of [Elstad's] later confession." *Id.* at 309, 105 S.Ct. at 1293.

The Court has refused to apply a "but for" test and has also rejected the theory that the second confession would be inadmissible under a "cat-out-of-the-bag" theory. *Id.* at 311, 105 S.Ct. at 1294. The Court went on to indicate that any psychological compulsion that may flow from the unwarned statement was too speculative and attenuated in terms of its impact:

> This Court has never held that the psychological impact of voluntary disclosure of a guilty secret qualifies as state compulsion or compromises the voluntariness of a subsequent informed waiver.
>
> The Oregon court, by adopting this expansive view of Fifth Amendment compulsion, effectively immunizes a suspect who responds to pre-*Miranda* warning questions from the consequences of his subsequent informed waiver of the privilege of remaining silent. . . .
>
> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question, as in this case. Justice Brennan's contention that it is impossible to perceive any causal distinction between this case and one involving a con-

> fession that is coerced by torture is wholly unpersuasive. Certainly, in respondent's case, the causal connection between any psychological disadvantage created by his admission and his ultimate decision to cooperate is speculative and attenuated at best.

Id. at 312-14, 105 S.Ct. at 1294-96. *See also United States v. Gonzalez-Sandoval,* 894 F.2d at 1047-49; *United States v. Sangineto-Miranda,* 859 F.2d at 1515-19.

Next, we shall apply the *Elstad* analysis to the question of the voluntariness of appellant's consent. It is not necessary for us to draw a distinction between a statement made by an accused and physical evidence, although we note that some courts have done so.* The legal standard as to the existence of consent is as follows: "Thus, while always viewing the facts in the light most favorable to the Government . . . this Court has appropriately concerned itself with whether those facts in any given case support the conclusion of consent." *United States v. Middleton,* 10 MJ 123, 133 (CMA 1981).

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* As the Supreme Court of North Carolina has stated:

> We do not see how the trustworthiness of the physical evidence admitted in this case could be affected by its admission or exclusion. Although the officers in this case violated the prophylactic rule of *Miranda* as extended by *Edwards* [*v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981)], they did not violate the defendant's constitutional right not to incriminate himself. It is important that all relevant evidence be submitted to the jury in order for it to make the proper findings. This outweighs the need to exclude evidence which was gathered as the result of a non-coercive statement made in violation of the prophylactic rule. . . .
>
> *State v. May,* 334 N.C. 609, 434 S.E.2d 180, 182 (N.C. 1993). *See also New York v. Quarles,* 467 U.S. 649, 661-71, 104 S.Ct. 2626, 2634-40, 81 L.Ed.2d 550 (1984) (O'Connor, J., concurring and dissenting).

Mil.R.Evid. 314(e)(4) and (5) provide that consent must be voluntary and must be shown by "clear and convincing evidence." In determining whether consent is voluntary, the Court should examine the totality of the circumstances. *Schneckloth v. Bustamonte,* 412 U.S. 218, 222, 93 S.Ct. 2041, 2045, 36 L.Ed.2d 854 (1973). *See United States v. Goudy,* 32 MJ 88, 90 (CMA 1991). Applying this test, there are several factors that establish the voluntariness of appellant's consent: She is an experienced law enforcement officer; she is knowledgeable about and filled out the consent form without assistance; she was allowed to set the time for the meeting with Capt. Thomas; she was free to leave the meeting; she was not frightened or confused; she was not evasive or uncooperative; she is 30 years old; she has some college education; and there were no threats or orders. *See United States v. McClain,* 31 MJ 130, 133 (CMA 1990); *United States v. White,* 27 MJ 264, 266 (CMA 1988); *United States v. Middleton,* 10 MJ at 132. *Cf. United States v. Sager,* 36 MJ 137, 143 (CMA 1992).

We hold that there was "clear and convincing evidence" of voluntary consent by this appellant.

The decision of the United States Air Force Court of Military review on further review is affirmed.

Chief Judge SULLIVAN and Judges COX, GIERKE, and WISS concur.

APPENDIX B

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM 27422 (f rev).

UNITED STATES

v.

STAFF SERGEANT CATHLEEN L. MURPHY, FR476-76-3060, UNITED STATES AIR FORCE

Sentenced Adjudged 20 July 1988.
Decided 11 Dec. 1992.

Accused was convicted by general court-martial, Reese Air Force Base, Mildred L. Raichle, J., of use of cocaine. The United States Air Force Court of Military Review, 29 M.J. 573, affirmed. Review was granted. The United States Court of Military Appeals, 33 M.J. 323, set aside and remanded. Upon further review, the United States Air Force Court of Military Review, Johnson, J., held that commander's failure to give Article 31 warnings did not affect voluntariness of consent to search by urinalysis.

Record returned to Court of Military Appeals.

Leonard, Senior Judge, dissented and filed opinion.

Appellate Counsel for the Appellant: Colonel Jeffrey R. Owens and Major Alice M. Kottmyer.

Appellate Counsel for the United States: Lieutenant Colonel Brenda J. Hollis, Major Paul H. Blackwell, Jr., and Captain Thomas E. Wand.

Before LEONARD, JAMES, and JOHNSON, Appellate Military Judges.

OPINION OF THE COURT UPON FURTHER REVIEW

JOHNSON, Judge:

A general court-martial convicted Staff Sergeant Murphy, contrary to her pleas, of one use of cociane. The members sentenced her to a bad-conduct discharge, confinement for 2 years, and reduction to E-1. The convening authority approved the adjudged sentence.

We previously reviewed four issues raised by appellant and found them all without merit.[1] However, we found appropriate only so much of the sentence as extended to a bad-conduct discharge, confinement for 15 months, and reduction to E-1. The Court of Military Appeals found appellant's Article 31, 10 U.S.C. § 831, rights were violated in an interview with her commander, at the conclusion of which appellant consented to a urinalysis that produced the primary evidence of her drug use.[2] Upon returning the record for further review, the Court of Military Appeals asked us to determine "whether the questioning of appellant without the required statutory warning precluded admissibility of the urinalysis results." *United States v. Murphy*, 33 M.J. 323, 329 (C.M.A.1991). We have done so, and we conclude the failure to warn appellant of her Article 31 rights did not make the urinalysis results inadmissible.

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[1] *United States v. Murphy*, 29 M.J. 573 (A.F.C.M.R.1989).

[2] The military judge found that Murphy was not a suspect at the time her commander questioned her. The Court of Military Appeals held she was a suspect, triggering the requirement for Article 31 warnings. This Court's previous decision upheld the military judge's voluntary consent to search determination without examining the Article 31 issue.

FACTS

In August 1987 appellant was a member of the security police squadron at Reese Air Force Base, Texas. Captain Thomas was her squadron commander and the chief of security police. On 17 August 1987, and Air Force Office of Special Investigations (OSI) agent told the security police superintendent, Senior Master Sergeant Spahr, that an informant had reported appellant had used drugs. The agent also suggested specific questions to ask appellant. On 18 August 1987, Sergeant Spahr and appellant's supervisor, Master Sergeant Holiman, told Captain Thomas of the drug use allegation. They told him the informant stated appellant was at the Fast and Cool Club with a woman named Tonya or Tina on the previous Saturday night, and appellant had used some illicit drug.

Captain Thomas directed that appellant be told to come in to see him. She was off duty at the time, and a message was left on her home answering machine to contact Captain Thomas' office. She called 19 August 1987 and arranged to meet with Captain Thomas before reporting for duty on the afternoon of 20 August 1987.

Appellant reported to Captain Thomas as scheduled. Her supervisor, Sergeant Holiman, was also present. Captain Thomas told appellant he needed to ask her some questions concerning here whereabouts on the previous Saturday night. He then asked her if she had been at the Fast and Cool Club. She answered, "Yes." [3] He asked her if she was with Tina, or Tonya. She again answered, "yes, Tonya." He then asked who Tonya was, and she said a civilian female that she had met. These were the questions

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[3] Appellant testified that she was asked about her whereabouts on Monday, 17 August 1987, rather than Saturday, 15 August 1987. This variance between her recollection and that of Captain Thomas and Sergeant Holiman is of no consequence to the issue before us.

suggested by OSI. Having confirmed these details of the informant's story, Captain Thomas told appellant he had received an allegation of drug use by her and asked if she was willing to take a urine test. She agreed. Sergeant Holiman accompanied appellant to the base hospital where she provided a urine sample, which tested positive for cocaine.

Captain Thomas did not advise appellant of her Article 31 rights at any time during this interview. Captain Thomas testified he initially viewed the OSI's allegation as rumor or speculation and he did not suspect appellant of any wrongdoing.[4] He said that if she had told him she was on duty the night in question, she was not at the Fast and Cool Club, or she did not know Tonya, he would not have asked her to take a urinalysis. Also, if she has asked to stop the interview and see a lawyer, he would have stopped, advised her of her rights, and given her an opportunity to see a lawyer. He further stated appellant's answers confirming her presence in the Fast and Cool

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[4] A few months earlier Captain Thomas had called appellant into his office to discuss a previous report that she was involved with drugs. The nature and extent of that conversation were not developed in any detail at trial, but the allegation was apparently treated as unfounded. Appellant was continued in her security police law enforcement duties, and just before her urinalysis report was received she was rated "outstanding" on a performance report. Appellant testified that Captain Thomas referred to the prior allegation during the interview in which she gave consent to search. Captain Thomas testified it was not mentioned. This question was not addressed in Sergeant Holiman's testimony. In her findings at trial, the military judge addressed the contradictions between appellant's testimony and that of Captain Thomas and Sergeant Holiman. She found appellant's testimony on these issues to be "totally self-serving and opportune in hindsight," and found the testimony of the others to be "totally credible . . . forthright and definite." We agree. We find that no menmtion of the prior allegation was made.

Club with Tonya on Saturday night did not, in themselves, confirm the allegation of drug use. Because of her apparent lack of concern, he testified his attitude at the time was, "as far as I'm concerned, it's still not true."

LAW AND ANALYSIS

Military Rule of Evidence 314 (e)(5) requires clear and convincing evidence of voluntariness for the admission of evidence based on a consent to search. A consent to search is valid if the totality of the circumstances show that the consent was freely and voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Frazier,* 34 M.J. 135 (C.M.A.1992); *United States v. Burns,* 33 M.J. 316 (C.M.A.1991); *United States v. Goudy,* 32 M.J. 88 (C.M.A.1991); *United States v. McClain,* 31 M.J. 130 (C.M.A.1990); *United States v. Roa,* 24 M.J. 297 (C.M.A.1987).

No single factor was identified in these cases as being decisive, but some of the circumstances mentioned have included:

(1) The degree to which the suspect's liberty was restricted (under escort, under arrest or apprehension, held in the office of law enforcement agents, called to the commander's office, etc.)

(2) The presence of any coercion, promises, direct orders, threats (including threats that if consent to search is withheld, an authority to search will be obtained or a command-directed urinalysis will be ordered), or other forms of intimidation or pressure.

(3) Awareness by the suspect that he or she had the right to refuse to consent to the search (as established by direct testimony or by oral or written warnings, in

the light of inferences drawn from the suspect's age, experience, education, training, and intelligence).

(4) The suspect's demeanor and apparent mental state (sober, calm, confident, cooperative, unconcerned; or confused, intimidated, tired, intoxicated, reluctant, anxious, etc.).

(5) Whether the suspect had consulted with counsel.

(6) The coercive effect of any prior violations of the suspect's constitutional or statutory rights (e.g., rights to legal counsel, or rights against self-incrimination under Article 31 or the Fifth Amendment).

We have examined the record of trial in appellant's case an weighed all the relevant facts and circumstances. Appellant was called to her commander's office, and she had a military duty to appear. She testified there were a variety of possible reasons for being called there, including future assignments or matters having to do with her subordinates. She reported formally, by standing at attention in front of his desk and saluting; he returned her salute and told her to be seated. She had drawn her sidearm for performance of her security police duties; she was not disarmed for the interview. The commander was not armed. The commander spoke to her in a normal conversational tone; there was nothing intimidating or coercive in his manner.[5] No promises, direct orders, threats, or other

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[5] In *Goudy, supra,* the Court of Military Appeals rejected an argument that any request for a consent to search made by a commander to a subordinate who has reported formally in the commander's office should be presumed to be involuntary because the circumstances make the request an "implied order." While the court rejected any such "bright-line rule," it expressly considered the setting as part of the totality of the circumstances.

forms of intimidation or pressure were used.[6] Captain Thomas did not tell appellant expressly that she had the right to refuse to consent to search but it was implicit in the phrasing of his request that she had the right. Appellant helped complete the consent to search form, which contains a warning that consent may be refused.[7]

Appellant was 30 years old. She had completed high school and some college courses. She had been in the Air Force for over 10 years. She spent her entire career in the law enforcement career field and progressed well in the

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[6] Appellant testified Captain Thomas told her that if she did not consent to a urinalysis, he would order a command-directed urinalysis. Both Captain Thomas and Sergeant Holiman denied this was said. In her findings at trial, the military judge addressed the contradictions between appellant's testimony and that of Captain Thomas and Sergeant Holiman. She found appellant's testimony to be "self-serving and oppotune in hindsight," and found the testimony of the others to be "totally credible . . . forthright and definite." We agree. We have weighed the evidence carefully, and we find that no mention of a command-directed urinalysis was made.

[7] The Air Force Form 1364 contained the following printed language:

> I know that I have an absolute right to give my consent to a search. I understand that, if I do consent to a search, anything found in the search can be used against me in a criminal trial or in any other disciplinary or administrative procedure. I also understand that, if I do not consent, a search cannot be made without a warrant or other authorization recognized in law. . . . Before giving my consent, I carefully considered this matter. I am giving my consent voluntarily and of my own free will, without having been subjected to any coercion, unlawful inducement and without any promise of reward, benefit, or immunity having been made to me.

The first sentence of this form is certainly inartful, but read together this warning makes it clear to anyone of reasonable intelligence that they have a right to refuse their consent.

career field. She was serving as a law enforcement flight chief and had completed consent for search forms in the course of her duties. She received training on search and seizure and provided such training to her subordinates. We find that appellant was well aware she had the right to refuse her consent for search.

Throughout appellant's interview with her commander and her completion of the consent form, she asked no questions and showed no hesitancy, uncertainty, or concern. She did not ask to speak with counsel or anyone else. Sergeant Holiman testified he accompanied appellant to the hospital and remained with her for the 1 to 2 hours it took to collect the urine sample. During that time, appellant voiced no concern or doubt about what she was doing. She made no request to call anyone on the telephone or to leave the hospital.

The primary remaining consideration is the effect of Captain Thomas' failure to give appellant a warning of her rights under Article 31, UCMJ, before questioning her. Her responses were in themselves not incriminating, but they corroborated certain details of the OSI informant's report. They were part of the chain of events that led to appellant's urinalysis, since Captain Thomas testified that he would not have asked her to consent to a urine test if she had denied these aspects of the informant's report.

There is no general requirement that a suspect be informed of his of her Article 31 rights before being asked to consent to search. *Frazier, supra.* Article 31 warnings become an issue in consent searches only when a law enforcement agent of other person in authority has asked the suspect questions without a proper Article 31 warning during the events preceding the consent to search. In such cases, the unwarned statements must be considered as part of the totality of the circumstances in deciding whether the suspect's consent to search was voluntary.

Appellant was a suspect, and she received no Article 31 warning before her commander asked her questions. The fact that appellant made these unwarned statements during the events leading up to her consent to search must be weighed for their likely impact on that decision. On their face, the facts she related were innocent. Captain Thomas did not tell her that her responses matched the informant's report. Her only complaint is that if she had been told she was suspected of an offense, or had been warned of her Article 31 rights, she would have known she was under suspicion and would not have consented to the search. This position is contradicted by the undisputed fact that Captain Thomas advised appellant before asking for her consent to the search that he had received allegations of drug use by her. There is nothing in the record that indicates appellant's decision to consent to the search was influenced in any way by the responses she made to her commander's questions. In the circumstances of this case we find Captain Thomas' failure to give Article 31 warnings did not effect the voluntariness of appellant's consent to search. Weighing the totality of the circumstances, we find her consent was voluntary, by clear and convincing evidence.

We are mindful that evidence derived from violations of Article 31 warning requirements is inadmissible. *United States v. Churnovic,* 22 M.J. 401 (C.M.A.1986). In this case, however, we find that appellant's consent to search was not "derived" from her responses to unwarned questioning. As just discussed, her responses did not affect the voluntariness of her consent. No information she provided was used to locate any evidence. There is no evidence as to whether Captain Thomas would have asked appellant for her consent if she had invoked her Article 31 rights (although we infer he would have, since he testified he was prepared to drop the inquiry only if she answered that she

was not at the Fast and Cool Club at the time in issue, or did not know Tonya). There is insufficient causal connection, on the specific facts of this case, to conclude that the urine test was tainted by Captain Thomas' failure to give an Article 31 warning.

In accordance with the mandate of the Court of Military Appeals, the record will be returned directly to that Court.

Judge JAMES concurs.

LEONARD, Senior Judge (dissenting);

I dissent from the majority's holding finding the results of appellant's urinalysis admissible in her court-martial. Using a totality of the circumstances rationale, I cannot find clear and convincing evidence that appellant voluntarily consented to give the urine sample used for the urinalysis.

In determining whether a consent to search is voluntary or mere acquiescence to authority, the facts and circumstances surrounding the giving of the consent are critical. Although I generally agree with the facts presented in the majority opinion, I find some differences that impact upon my application of a totality of the circumstances analysis.

First, appellant's meeting with her commander to discuss allegations of her drug use was clearly conducted in terms of an enlisted person ordered to report to her commander.[8] Appellant was notified by telephone to

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[8] I agree with the majority that there is no presumption of involuntariness merely because a request for consent occurs following a subordinate reporting to a commander. However, the majority also correctly notes that the location and the circumstances leading up to a request for consent are part of the totality of the circumstances. *United States v. Goudy*, 32 M.J. 88, 91 (C.M.A.1991). Under the circumstances of appellant's case, I accord more weight to the

come and see her commander immediately or as soon as possible. Captain Thomas testified he considered the request to come and see him an order for appellant to report to his office. Appellant walked into Captain Thomas' office, saluted him, and remained at attention until he gave her further direction. She reported to Captain Thomas with her supervisor Master Sergeant Holiman. According to the testimony of appellant and Holiman, appellant could not leave until Captain Thomas dismissed her.

Second, although he hedged as to whether appellant's responses to his unwarned questioning verified the allegation, Captain Thomas testified her responses confirmed the alleged facts and circumstances of appellant's drug use as reported to the Air Force Office of Special Investigations (OSI) by an unknown informant.

Third, the majority finds implicit in the phrasing of Captain Thomas' request for the urinalysis a right to refuse to consent. That finding stretches the evidence. Captain Thomas ordered appellant to report to his office. She reported in a formal manner and was not free to leave until he dismissed her. Captain Thomas asked her specific questions about her whereabouts on a particular evening. Immediately after hearing her responses, he told her there was an allegation she had used drugs and asked for her consent to a urinalysis. Finding an implicit right to refuse contained in this sequence of events is difficult.[9]

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circumstances of appellant's reporting to her commander than the majority.

[9] In footnote 7, the majority sets forth printed language of Air Force Form 1364 concerning the "absolute right to give my consent to a search" afforded the person asked for a consent to search. The wording of this form is not merely "inartful." It is deliberately misleading and should be changed without delay.

The Court of Military Appeals found Murphy was a suspect and should have been advised of her Article 31 rights before being questioned. Upon returning her record for further review, they asked us to determine "whether the consenual urinalysis was tainted by the violation of Murphy's Article 31 rights." *United States v. Murphy,* 33 M.J. 323, 329 (C.M.A.1991).

Before *Murphy,* the law seemed well established that a consent to search and seizure is valid if clear and convincing evidence of the totality of the circumstances show the consent was freely and voluntarily given. *Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); *United States v. Frazier,* 34 M.J. 135 (C.M.A.1992); *United States v. Burns,* 33 M.J. 316 (C.M.A.1991); *Goudy,* 32 M.J. at 90; *United States v. McClain,* 31 M.J. 130 (C.M.A.1990); Mil.R.Evid. 314(e)(5). The language of *Murphy* could be construed to require a taint attenuation analysis as a step separate from a totality determination.

In *Frazier,* Chief Judge Sullivan addressed an Article 31 violation in the context of consent to a search. He treated the Article 31 violation in *Frazier* as "a factor to be considered in determining the voluntariness of appellant's later consent to search." 34 M.J. at 138 (concurring in the result.[10] Although the facts of *Frazier* differ from those before us, I believe the rationale of Chief Judge Sullivan's opinion applies. Frazier's supervisor suspected Frazier of having stolen some money from his roommate and the supervisor asked Frazier whether he had stolen the money.

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[10] Judge Cox wrote the lead opinion and found the viewing of the contents of Frazier's wallet was a lawful search since Frazier voluntarily gave up the wallet without any coercion. Judge Cox found there was no interrogation of Frazier prior to the request to see the wallet. The remaining members of the Court did not participate.

He denied it. The supervisor then asked to see Frazier's wallet and Frazier gave his wallet to the supervisor. The wallet contained large bills approximating the amount allegedly stolen. In finding Frazier's consent voluntary, Chief Judge Sullivan's analysis of the Article 31 "factor" focused on the "non-incriminating non-coerced nature" of Frazier's responses. *Id.*

Following this rationale, I would examine any "taint" from Murphy's Article 31 violation as a factor bearing upon the volunariness of appellant's consent.[11] In analyzing this factor, I would focus on (1) the length of time between the violation and the consent, (2) the intervening circumstances, (3) the flagrance of the violation,[12] (4) the

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[11] In *Burns,* Senior Judge Everett analyzed the relationship of the Fourth, Fifth, and Sixth Amendment to a consent to search situation. He noted that the Fifth and Sixth Amendments right to counsel and Article 31 protections were not applicable to a request for consent to search in the course of an initial investigation of an offense. *Burns,* 33 M.J. at 319, 320; *United States v. Roa,* 24 M.J. 297, 299 (C.M.A.1987). He found that the Fifth Amendment and Article 31 did not apply because consent was not a statement and a request for consent was not interrogation. *Burns,* 33 M.J. 320. The Sixth Amendment right to counsel was found inapplicable when the government was still engaged in an initial investigation and had not made any formal accusations of criminal conduct. *United States v. Cronic,* 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984); *Burns,* 33 M.J. at 319; *Roa,* 24 M.J. at 299. Judge Everett concluded the only real issue is a totality of circumstances analysis of whether the consent to search was given freely and voluntarily. *Burns,* 33 M.J. at 320; Mil.R.Evid. 314 (e)(4).

[12] These three factors have been considered by a number of courts as circumstances bearing on a totality determination. *See Brown v. Illinois,* 422 U.S. 590, 603-04, 95 S.Ct. 2254, 2261, 45 L.Ed.2d 416 (1975) (illegal arrest preceded warned confessions); *United States v. Richardson,* 949 F.2d 851, 858 (6th Cir.1991) (illegal arrest preceded consent); *United States v. Walker,* 933 F.2d 812, 818 (10th Cir.1991), *reh'g denied* 941 F.2d 1086 (10th Cir.1991), *cert. denied* ____ U.S.

coercive nature of the unwarned questioning, and (5) the incriminating nature of the responses. However, as the majority correctly points out, consideration should not be limited to the circumstances of the Article 31 violation. This factor must be considered with all other relevant factors, including whether the consent was requested in a custodial setting; whether the suspect was advised of her right to refuse to consent; the tone of voice and demeanor of the requestor; and the age, rank, education, and experience of the person giving the consent. *Burns,* 33 M.J. at 320, 321; *Goudy,* 32 M.J. at 90-91.

In my view, the Article 31 violation and its circumstances injected an element of subtle coercion that raised serious doubts about Murphy's ability to give a free and voluntarily consent. Captain Thomas ordered Murphy to report to his office. Once she reported, he then conducted a unwarned interrogation of specific questions designed to verify her drug involvement. As soon as her answers confirmed the suspicions of the OSI, Captain Thomas requested she consent to give a urine sample. No break occurred in the sequence of events, and no one told Murphy she had a right to refuse to give her consent. I find a direct nexus between Captain Thomas' Article 31 violation and appellant's consent to give the urine sample.

No intervening circumstances occurred to disrupt this direct nexus. In fact, the only intervening circumstances served to intensify the coercive atmosphere rather than alleviate it. After Murphy's responses, Captain Thomas highlighted the incriminating nature of her unwarned responses by immediately telling her someone had alleged she had been involved with drugs. This sequence of events placed Murphy in a situation where she could have reason-

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____, 112 S.Ct. 1168, 117 L.Ed.2d 414 (1992) (illegal detention preceded consent).

ably felt compelled to defend herself against statements just taken from her in violation of her Article 31 rights.

While Captain Thomas' unlawful interrogation could be an innocent technical violation, the circumstances seem to indicate otherwise. I am particularly concerned that agents of the Air Force Office of Special Invegtigations suggested asking the specific unwarned questions. The government did not provide any evidence concerning the purpose or context of the suggested questions to dispel the suspicious nature of this method of interrogation. Second, the method of interrogation becomes even more suspicious considering the questions were asked by a security police squadron commander to investigate a second allegation of drug involvement. Captain Thomas may have acted with good intentions, but such an obvious disregard of Article 31 responsibilities is troubling.[13] I would find violation of appellant's Article 31 rights intentional and flagrant.

The majority finds appellant's responses to Captain Thomas' questions not incriminating. I do not agree. An informant reported to the OSI that appellant had used cocaine at the Fast and Cool Club with a civilian named Tina or Tonya over the previous weekend. Captain Thomas testified he asked appellant specific questions to verify this allegation of illegal drug use. These questions were designed to verify all the surrounding facts of the informant's report without directly asking appellant whether she illegally used cocaine. Captain Thomas also testified appellant's responses verified the facts reported to him of the circumstances of the allegation. Because of this verification, he asked her consent for a urine sample. He testified that, if her responses had not verified the facts reported to him, he would not have asked for her to give a

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[13] It is ironic that Captain Thomas testified he would have given her rights advisement only after she had invoked her rights.

sample. Appellant's responses placed her at the scene of the crime, at the time the crime reportedly occurred, and with the person alleged to be her accomplice. Her responses created an inference that she committed the crime reported by the informant. Under these circumstances, I find the responses incriminating.

In addition to the coercion arising from the direct nexus to Captain Thomas' unwarned questioning. I find other evidence of coercion present in the circumstances of appellant's consent. First, the ordering of appellant to report to her commander's office with her supervisor for questioning set the stage for acquiescence rather than voluntary consent. Appellant and her supervisor knew she could not leave until her commander released her. Second, despite the obvious inference of coercion from such a setting, neither Captain Thomas nor Master Sergeant Holiman ever mentioned she could refuse to consent. Alone this other evidence of coercion would not cause me to find appellant's consent involuntary. However, when it is combined with the circumstances of Article 31 violation, it further undermines the governmet's position.

Usually, Murphy's age, rank, and experience could help support a finding of valid consent, *Burns,* 33 M.J. at 321; *Goudy,* 32 M.J. at 91, but under the circumstances of this case, these factors may have increased her compelling interest in defending herself. What wrongly accused NCO would refuse to cooperate with her commander and supervisor and help clear her good name? How could a law enforcement NCO, who has already made statements to the chief of security police verifying the circumstances of alleged drug use, reasonably believe that her denial of consent would be perceived as anything other than an admission of guilt? This belief could be even stronger when the

NCO has already faced the same commander concerning a prior allegation.[14]

There is no evidence that Captain Thomas or Master Sergeant Holiman ordered Murphy to give consent, but a totality of circumstances analysis of voluntariness goes beyond an examination of explicit actions and statements. The subtle and implicit pressures commanders can bring to bear upon an airman are a proper matter for concern. To find a free and voluntary consent we must be satisifed by *clear and convincing evidence* that subtle and implicit pressures of command have not overwhelmed the airman giving the consent. *United States v. Goudy,* 32 M.J. 88, 91 (C.M.A.1991); *United States v. Ward,* 19 M.J. 505, 507 (A.F.C.M.R.1984); Mil.R.Evid. 314(e)(5). After considering all the circumstances and paying particular attention to the background and effect of the unwarned interrogation, I do not find clear and convincing evidence that Murphy's consent to the urinalysis was freely and voluntarily given.

Because the urinalysis results were the keystone of the government's case, appellant's conviction cannot stand.[15]

I would set aside the findings of guilty and the sentence.

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[14] Although Captain Thomas testified he did not mention the prior allegation of drug involvement by appellant, both he and appellant were well aware this was the second time she had been called before him to answer to drug related allegations.

[15] With the exception of three brief witnesses, the government's entire case-in-chief involved the urinalysis.

These three witnesses testified about statements made by appellant while the urinalysis results were pending. Her statements consisted of concerns that she may have been given drug laced cigarettes and questions about the affect the lacing could have on the urinalysis. Tonya Brooks was called as a witness in rebuttal and testified that she used cocaine with appellant during the charged time period. The defense was able to mount a substantial attack on Ms. Brooks credibility. In my opinion, the testimony of Ms. Brooks would not establish appellant's guilt beyond a reasonable doubt.

APPENDIX C

U.S. COURT OF MILITARY APPEALS

No. 63,837.
ACM No. 27422.

UNITED STATES, APPELLEE,

v.

CATHLEEN L. MURPHY, STAFF SERGEANT,
U.S. AIR FORCE, APPELLANT.

Argued Oct. 3, 1990.
Decided Sept. 30, 1991.

Accused, staff sergeant, United States Air Force, was convicted by general court-martial, Reese Air Force Base, Texas, Mildred L. Raichle, J., of wrongful use of cocaine. The United States Air Force Court of Military Review, 29 M.J. 573, affirmed. Review was granted. The United States Court of Military Appeals, Everett, Senior Judge, held that: (1) the military judge did not commit prejudicial error by failing to suppress the testimony of government rebuttal witness where the Government had not signified an intent to call that witness in response to discovery requests, and (2) accused became a "suspect" entitled to receive warnings after accused's commander received specific report that particular subordinate had committed a crime and commander asked accused specific questions suggested by law enforcement agents.

Set aside and remanded.

Sullivan, C.J., filed a concurring statement.

For Appellant: *Major George P. Clark* (argued); *Colonel Richard F. O'Hair* (on brief).

For Appellee: *Captain Thomas E. Ward* (argued); *Colonel Robert E. Giovagnoni, Major Paul Blackwell, Jr., Captain Morris D. Davis* (on brief); *Lieutenant Colonel Brenda J. Hollis.*

Opinion of the Court

EVERETT, Senior Judge:

A general court-martial with officer members tried Staff Sergeant Cathleen L. Murphy in July 1988 at Reese Air Force Base, Texas, on the single charge that, "within the continental United States, sometime between 6 August 1987 and 20 August 1987, [she] wrongfully use[d] cocaine," in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. Contrary to her pleas, she was found guilty as charged and sentenced to a bad-conduct discharge, confinement for 2 years, and reduction to airman basic. After approval of the sentence by the convening authority, the Court of Military Review affirmed the findings and the sentence, except for reducing her confinement by 9 months. 29 MJ 573, 577 (1989).

We granted review on this specified issue:

> WHETHER THE MIITARY JUDGE COMMITTED PREJUDICIAL ERROR BY FAILING TO SUPPRESS THE TESTIMONY OF A GOVERNMENT REBUTTAL WITNESS WHERE THE GOVERNMENT HAD NOT SIGNIFIED AN INTENT TO CALL THAT WITNESS IN RESPONSE TO A DISCOVERY REQUEST.

I

The Air Force Office of Special Investigations (OSI) received an informant's report that Murphy, a security

police flight chief, had been seen using drugs in the company of a woman named Tonya or Tina at the Fast and Cool Club in Lubbock, Texas. After her squadron commander, Captain Danny Thomas, had learned of this report, he asked appellant to come in to see him. When she reported to him on August 20, 1987, she responded to his questions by saying that she had been at the Fast and Cool Club in the company of a Tina or Tonya the preceding weekend. Then he told her that she had been alleged to have used cocaine, and he asked her to consent to a urinalysis. She gave her consent; and the urinalysis tested positive for cocaine.

At appellant's trial, which began on July 12, 1988, the prosecution's case-in-chief relied heavily on the results of the urinalysis. After a government expert had testified to the drug-testing procedures that had been utilized, trial counsel called Dr. Whiting, a defense consultant or expert, "as an adverse witness" over vigorous defense objections. He testified that, in view of Murphy's reading of 507 nanograms per milliliter on the urinalysis test, she must have felt the effects of the cocaine—no matter how it was ingested. Three prosecution witnesses testified that Murphy had told them that someone might have given her laced cocaine cigarettes or put cocaine in her drink and that she wanted to know if a urinalysis would be positive under these circumstances.

The government rested its case about 9:00 a.m. on July 18, 1988. After about an hour recess, the court reconvened; and the defense began putting on its case. Appellant was called as the first defense witness; and she testified that she had never "intentionally" or "knowingly used cocaine between" August 6 and August 20, 1987. According to her, "every other day or so" in July and August 1987 she had drunk a lot of Peruvian tea, which she had received from the girlfriend of her brother-in-law when

she had been in California. Furthermore, she suggested in her testimony that someone might have laced her drink or cigarette with cocaine, and this might have caused her urine sample to test positive for cocaine.

On cross-examination, Murphy testified that the week before her urinalysis, she had gone to several nightclubs and on August 17, 1987, had visited the Fast and Cool Club with a girl named Tonya. There, they "had been drinking," and she had received two or three Kool cigarettes from Tonya. However, she did not know whether Tonya had put anything in her cigarettes. According to appellant, someone might have put something in her drink at the Fast and Cool Club when a couple of college students came in and sat down with them. Murphy also recalled that, about the time of the urinalysis, she was taking medication for a shoulder injury and that she had taken Tylenol, which had codeine.

On redirect examination, appellant admitted that she had met Tonya previously at the Crystal Club and that Tonya had called her on the afternoon of August 17 about going out. "She gave me directions how to get down to her apartment or whatever, and I picked her up at, I think about 8 o'clock or so—8, 8:30."

The defense recalled Dr. Whiting, a toxicologist, to testify in its behalf. According to him, someone could drink cocaine-laced tea without noticing any unusual effects or could unknowingly smoke a cocaine-laced cigarette. However, he conceded on cross-examination, that, if someone had seen Murphy snort cocaine up her nose 3 days before her urinalysis, the hypothetical situation of unknowing ingestion which he had described were "irrelevant."

The defense rested its case at 3:44 p.m. on July 18, 1988. Thereupon, the prosecution indicated that he intended to call Ms. Tonya Brooks as a rebuttal witness; he proffered

that she would "testify that she was with the accused" on Monday evening, August 17, 1987, when they had "use[d] cocaine . . . in an automobile outside the Cadillac Bar, and" later inside a restroom at the Fast and Cool Club. The defense promptly requested that they "be permitted to interview her and do some checking on her."

When the military judge then inquired why trial counsel had not called Tonya Brooks as a witness during "the Government's case-in-chief," the explanation offered was that the OSI had not located the witness until the night before the trial started. "The statement was received approximately 11 o'clock or 2300 hours, on the 11th, the day prior to trial, by one of the OSI agents." Furthermore, according to assistant trial counsel, he had not received a copy of Tonya's statement until the afternoon of the next day – after trial had begun at 8:30 a.m. on July 12. He further explained that he had first talked to the witness about 15 minutes before the present session and that he had not been "able to talk to her" until that time, and for this reason had not used her earlier as a witness.

Defense counsel then noted that long before, on January 22, 1988, he had served on the Government "a discovery request" for "copies of all statements made by witnesses, and . . . this [had been] a continuing request." Therefore, because the Government had not complied with this request by disclosing Tonya's statement, she should not be "allowed to testify." Defense counsel then states that, if the court "ruled against" his motion, the defense should be provided a copy of the statement "and also given an opportunity to interview" the witness.

After assuring herself that Tonya's statement was not "exculpatory," the military judges ruled that she would allow the witness to testify and that, after testimony on direct, the defense would be given a recess so that they could interview Tonya before cross-examining her. The

military judge acceded to a defense request that a copy of the statement be provided after direct examination; that the agent who had located Tonya be made available for an interview during the recess; and that the defense have an "opportunity to conduct a brief background check with police agencies" to find out whether Tonya had any "prior convictions."

Tonya then testified as a prosecution witness that she and Murphy had gone "out one Monday evening." Appellant had come by and picked her up, and they had gone to appellant's "house to get some money." Murphy then came back and purchased some cocaine from Tonya's boyfriend; and she and Tonya snorted the cocaine through a straw while they were inside the car which was parked at the Cadillac Bar. After a beer or two there, they walked next door to the Fast and Cool Club, where they drank some more beer before going to a restroom and finishing off the rest of the quarter of a gram of cocaine.

After this testimony on direct examination, the military judge recessed the court from 4:10 p.m. on July 18 until 1:32 p.m. the next day. When trial resumed, defense counsel cross-examined Tonya, who stated that she was "testifying . . . under a grant of immunity from the State of Texas." The defense also presented evidence that Tonya had a reputation as a liar and had been convicted of drunk driving. On redirect, Tonya testified that if she had given Murphy "a cocaine-laced cigarette . . . she would have known from the time she got it, with a cigarette that doesn't have the filter in it, that something's in the cigarette. Plus, if it's cut in half you know something's wrong. And she would have tasted it . . . on her tongue, on her mouth."

According to Tonya, she had talked with appellant once after they had gone out on August 17, 1987. This had been a week or two later, when Tonya had called appellant

to discuss plans they had made to go out again. During that call, Murphy had told her that someone from the base who had seen them together knew that Tonya was involved "with drugs" and had told appellant "to stay away from" her. Tonya also testified that later on the Monday evening when she and appellant had gone out, she had returned to her boyfriend's apartment; but, after they had a fight, she had moved back to her mother's house. However, Murphy had known how to reach her, because she had Tonya's mother's telephone number. Finally, Tonya testified that she had given appellant a line of cocaine 3 or 4 days before they had gone out together on August 17, 1987.

On recross-examination, the witness testified that Murphy had known about her moving back to her mother's house, because they talked about going out, and she had given Murphy her mother's telephone number. "I told her if she came by Bobby's [her boyfriend] and I wasn't there, that I would be at my mom's, and she could contact me there. That was the reason for me giving her my mother's number."

In surrebuttal, the defense offered evidence of Murphy's good military character. Moreover, they called as a witness Mr. Clifford May, who once had employed Tonya for about 3 months. According to him, he would not "believe her under oath," and "one of [his] employees didn't trust her."

Another defense surrebuttal witness was Thomas Barron who, along with Larry Shelby, Tonya, and Murphy, had been at appellant's apartment on Monday, August 17. However, he had not seen Murphy use cocaine that evening; and he had never known her to use the drug. He would believe Murphy under oath; and he stated that "her reputation for truthfulness" was "pretty good."

II

Before the Court of Military Review, Murphy contended that the military judge had committed error by allowing Tonya Brooks to testify. In this connection, she complained that the Government had not complied with RCM 701(a)(3)(A) and 701(d), Manual for Courts-Martial, United States, 1984.

The court below concluded that, under our holding in *United States v. Trimper,* 28 MJ 460 (CMA), *cert. denied,* 493 U.S. 965, 110 S.Ct. 409, 107 L.Ed.2d 374 (1989), trial counsel should have disclosed Tonya's name to the defense and provided the defense with a copy of her pretrial statement because the prosecutor should have foreseen the likely relevance of her testimony. However, the court was convinced that the military judge had provided an adequate remedy for this error.

In this appeal, as in the Court of Military Review, Murphy contends that she was prevented from effectively defending against the cocaine-use charge by the prosecutor's seemingly deliberate—and certainly successful—use of a surprise eyewitness. She asserts that, despite their best efforts and the continuance they were granted, the defense team could not effectively challenge the rebuttal witness. According to the defense, Tonya's testimony was material evidence; and the sanction imposed for withholding this evidence should be its exclusion at trial. Thus, they argue, the military judge's failure to exclude the testimony was prejudicial error.

In addition, the defense contends that, in view of the prosecution's tactics of ambush, the Government should carry a heavier burden in order to sustain the conviction. Appellant insists that the testimony of Tonya Brooks, who was an alleged eyewitness of the crime, was not rebuttal evidence in the usual sense; and so, if not offered in the Government's case-in-chief, it should be excluded.

We agree with appellant and with the Court of Military Review that Tonya's statement should have been given to the defense before the time that trial counsel was preparing to call her as a rebuttal witness. RCM 701(a)(1)(C) requires trial counsel to "provide . . . to the defense . . . [a]ny sworn or signed statement relating to an offense charged in the case which is in the possession of the trial counsel." Furthermore, trial counsel is required to provide the sworn or signed statement to the defense "[a]s soon as practicable after service of charges." If that cannot be done because "extraordinary circumstances make it impracticable," trial counsel must then give the defense an opportunity "to inspect" the statement.

Months before appellant's trial, the defense had made a continuing request for discovery of any witness' statements. Pursuant to that request and in accordance with RCM 701(a)(1)(C), the prosecutor should have given a copy of Ms. Brooks' statement to the defense shortly after receiving it from the OSI on July 12, 1988. Indeed, trial counsel was in the same courtroom with defense counsel; and it certainly would have taken little effort to hand a copy of the statement over to the defense. Under no circumstances should it have taken the prosecutor a week to disclose the statement to the defense. Contrary to trial counsel's apparent belief, the disclosure requirement under RCM 701 does not depend in any way on whether trial counsel has had an opportunity to read the witness' statement or to talk to the witness.

RCM 701(a)(3)(A) requires: "Before the beginning of trial on the merits the trial counsel should notify the defense of the names and addresses of the witnesses the trial counsel intends to call: (A) In the prosecution case-in-chief; and (B) To rebut a defense of alibi or lack of mental responsibility, when trial counsel has received timely

notice under subsection (b)(1) or (2) of this rule."[1] This provision would have applied if trial counsel had intended to call Tonya "in the prosecution case-in-chief." However, there is no evidence that contradicts the prosecutor's representations that he had never planned to call Tonya as a witness in his case-in-chief and, indeed, that he had neither received Tonya's statement nor talked to her until after the trial had started.

Ordinarily the evidence at trial is presented in this sequence:

> (A) Presentation of evidence for the prosecution;
>
> (B) Presentation of evidence for the defense;
>
> (C) Presentation of prosecution evidence in rebuttal;
>
> (D) Presentation of defense evidence in surrebuttal;
>
> (E) Additional rebuttal evidence in the discretion of the military judge; and
>
> (F) Presentation of evidence requested by the military judge or members.

RMC 913(c)(1). We do not interpret this provision to require that the Government use in its case-in-chief every possible eyewitness or person with knowledge of the crime. Instead, the prosecutor may decide, for instance, that some of his evidence is cumulative and should not be offered unless some need arises. Under those circumstances, RCM 701(a)(3)(A) does not apply; and the prosecutor need not disclose the names of the witnesses whom he will not be calling in his case-in-chief.

However, a trial counsel who holds back material evidence for possible use in rebuttal to ambush the defense runs a risk. The military judge has the responsibility to

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[1] RCM 701(b)(1) and (2) requires the defense to give the Government notice that it intends to claim alibi or lack of mental responsibility.

"exercise reasonable control over the proceedings to promote the purposes of" the Rules for Courts-Martial and the Manual for Courts-Martial. RCM 801(a)(3); *cf.* RCM 102(a). In the exercise of that control, a military judge is entitled to exclude prosecution evidence in rebuttal, if the judge concludes that it should have been offered in the prosecution case-in-chief and has not fulfilled the purpose of rebuttal – namely, "to explain, repel, counteract, or disprove the evidence introduced by the opposing party." *See United States v. Cleveland,* 29 MJ 361, 363 (CMA 1990). Thus, the military judge, in her discretion, could have excluded the testimony of Tonya Brooks on the ground that it was not proper rebuttal and should have been offered as part of the prosecution case-in-chief.

Although we agree with the defense that trial counsel violated RCM 701(a)(1)(C) by not giving Tonya's statement to the defense at an earlier time, we are not convinced that exclusion of her testimony was necessary to remedy the error. As we recently observed in *United States v. Trimper, supra* at 468, RCM 701(g)(3) allows the military judge to choose among several remedies in order "to redress a [government] failure to disclose evidence." These remedies include "ordering discovery, granting a continuance, [and] excluding the evidence."

Here the military judge granted appellant a continuance for several hours; required trial counsel to deliver to defense a copy of Tonya's statement; and gave defense counsel an opportunity to interview Tonya before cross-examining her. The circumstance that, during the continuance, defense counsel were able to conduct a background investigation of the witness, obtain a certified copy of her conviction for driving under the influence, and locate a witness who testified in surrebuttal about Tonya's lack of truthfulness tends to show that the prosecution's omission could be remedied without excluding the witness'

testimony. Indeed, in defense counsel's reply to the staff judge advocate's post-trial recommendation to the convening authority, the only defense complaint was the lack of sufficient time to obtain evidence about Tonya's reputation and veracity.

Appellant has not shown us that she suffered any specific prejudice from the delay in receiving a copy of the statement by Tonya Brooks; and we have discovered none from our study of the record. Moreover, we conclude that the testimony given by Tonya Brooks would have been almost equally damaging to the defense even if it had been presented as part of the government case-in-chief, rather than in rebuttal. Most important, we are sure that the defense had adequate opportunity to controvert the belatedly introduced evidence. *Cf. United States v. Sadler,* 488 F.2d 434, 435 (5th Cir.), *cert. denied,* 417 U.S. 931, 94 S.Ct. 2642, 41 L.Ed.2d 234 (1974).

In *Trimper,* we observed that, if the military judge had accepted the defense contention that nondisclosure was part of a cunning prosecutor's scheme to ambush appellant, the grounds for excluding the evidence would be stronger. Although in this case the prosecution used some unorthodox tactics—at least one of which was criticized by the court below[2]—we are unconvinced that the absence of disclosure about Tonya and her statement was a trick by the prosecution.

Furthermore, the defense should not have been surprised that the Government might locate Tonya and use her as a witness sometime during the trial. From the time of the first report of Murphy's cocaine use, the name of Tonya was associated therewith. Indeed, appellant herself

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[2] The Court of Military Review expressed distaste for the prosecutor's calling Dr. Whiting as a government witness during the prosecution case-in-chief. 29 MJ 573, 577 (1989).

admitted to her squadron commander that she had associated with "Tonya or Tina" at a club. At an earlier point, Murphy had stated to a friend that a female companion might have laced her drink or cigarette with cocaine; and Murphy testified at trial that she had been with Tonya at a club on the night of August 17, 1987. Thus, Tonya did not spring "full blown from the head" of trial counsel, as appellate defense counsel seem to intimate.

The defense was aware of Tonya Brooks' existence and cannot really complain of foul play because the Government managed to locate her. Indeed, it seems that Murphy knew how to contact and locate Tonya all along, while the Government was frantically trying to find her. Under these circumstances, appellant deserves little judicial sympathy.

III

Although we decide the granted issue against appellant, our review of the record has revealed a matter which was raised at trial and gives us great concern. Captain Danny Thomas called Murphy in to see him after he had learned of an informer's report to the OSI that appellant had been using cocaine with another woman. Apparently in coordination with the OSI, he had prepared three questions to ask her. When she reported in, Captain Thomas asked her these questions; but he did so without giving her a warning under Article 31(b), UCMJ, 10 USC § 831(b). In his view, such a warning was not required because she had not yet become a "suspect."

Unfortunately, we have difficulty in accepting this limited construction of the term "suspect." After a commander or supervisor has received a specific report that a particular subordinate has committed a crime and the commander then prepares to ask specific questions sug-

gested by law-enforcement agents, it is unrealistic to say that the person to be questioned is not a "suspect."

After answering three questions by Captain Thomas, Murphy was asked to consent to a urinalysis. According to Thomas, if her answers had been different, he would not have ordered the urinalysis; but because in some way her responses seemed to corroborate the report received by the OSI, he decided to go forward with the urinalysis.

We recognize that consent to a urinalysis involves Fourth Amendment—not Fifth or Sixth Amendment—rights. *Cf. United States v. Burns,* 33 MJ 316 (CMA 1991); *United States v. Roa,* 24 MJ 297 (CMA 1987). Also, the Sixth Amendment right to counsel is not involved in the preliminary stage of a criminal investigation. Nonetheless, in light of Thomas' acknowledgment as to the basis for his consent request, we believe it is appropriate to consider whether the consensual urinalysis was tainted by the violation of Murphy's Article 31 rights. Moreover, initially the Court of Military Review should deal with this issue.

IV

The decision of the United States Air Force Court of Military Review is set aside. The record of trial is returned to the Judge Advocate General of the Air Force for remand to that court to determine whether the questioning of appellant without the required statutory warning precluded admissibility of the urinalysis results. If the answer is in the negative, the record will be returned directly to this Court. Otherwise Article 67(a), UCMJ, 10 USC § 867(a) (1989), will apply.

Judge Cox concurs.

SULLIVAN, Chief Judge (concurring):

I write only to note my separate opinions in *United States v. Burns,* 33 MJ 316 (CMA 1991), and *United States v. Roa,* 24 MJ 297, 302 (CMA 1987).

APPENDIX D

U.S. AIR FORCE COURT OF MILITARY REVIEW

ACM No. 27422.

UNITED STATES

v.

STAFF SERGEANT CATHLEEN L. MURPHY, FR 476-76-3060, UNITED STATES AIR FORCE..

Sentence Adjudged 20 July 1988.
Decided 27 Sept. 1989.

Accused, staff sergeant, United States Air Force, was convicted by general court-martial, Reese Air Force Base, Texas, Mildred L. Raichle, J., of wrongful use of cocaine, and she appealed. The United States Air Force Court of Military Review, Kastl, Senior Judge, held that: (1) granting a continuance, rather than suppressing the testimony of a rebuttal witness, was an adequate remedy for the prosecutor's failure to disclose the testimony; (2) testimony of the accused's commander about whether he would like to have the accused back in his unit was a permissible observation, not an impermissible recommendation that the accused not be returned to duty any place in the Air Force; and (3) the prosecutor should not have called a defense consultant as a prosecution witness without clear and convincing reasons, but no prejudice resulted.

Affirmed.

Lewis, Senior Judge, concurred in part and dissented in part with opinion.

Appellate Counsel for the Appellant: Mr. John J.C. O'Shea, Lubbock, Texas; Colonel Richard F. O'Hair and Major Frank J. Spinner.

Appellate Counsel for the United States: Colonel Joe R. Lamport, Lieutenant Colonel Robert E. Giovagnoni, Major Terry M. Petrie and Captain David G. Nix.

Before LEWIS, BLOMMERS and KASTL, Appellate Military Judges.

DECISION

KASTL, Senior Judge:

Following a heavily-litigated trial which the prosecution called a "war of attrition," appellant Staff Sergeant Murphy was found guilty by a general court-martial consisting of members of wrongful use of cocaine, a violation of Article 112a, UCMJ, 10 U.S.C. § 912a. A significant portion of the prosecution's evidence consisted of the results of a positive urinalysis indicating the presence of cocaine in the appellant's urine. Her sentence is a bad conduct discharge, two years of confinement, and reduction to airman basic. Before us, she raises four matters for our consideration.

Adequate Notice Under R.C.M. 701

The appellant first argues that the military judge erred by failing to suppress the testimony of a government rebuttal witness after the prosecution failed to follow the dictates of R.C.M. 701. That witness, Ms. Tonya Brooks, testified, over defense objection, as an accomplice and the sole eyewitness to the cocaine offense charged.

We disagree and find the recent decision of *United States v. Trimper,* 28 M.J. 460 (C.M.A. 1989) dispositive. The defense insisted at trial that Brooks' name should have been revealed in response to the defense's routine disclosure request—or at least made known after the defense moved that the Government particularize the specific location at which the accused supposedly ingested cocaine. After Brooks testified, the military judge permitted the defense a continuance from the close of court the afternoon of 18 July until the afternoon of 19 July; the defense succeeded in ferreting out both a witness who testified that Ms. Brooks had bad character and proof of a Texas conviction for driving while intoxicated.

Following the guidance of *Trimper*, we hold that the prosecutor should have foreseen the likely relevance of this witness's testimony and disclosed it. *See* R.C.M. 701(a)(3) and 701(d) and *United States v. Callara,* 21 M.J. 259, 263 (C.M.A. 1986). Though we follow the reasoning of the Court of Military Appeals in *Trimper* and *Callara* that failure to disclose was error, we find—as did the Court of Military Appeals in those two cases—that excluding the testimony of the witness was unnecessary to cure the dilemma. The military judge was free to fashion other remedies. Here, she did so by granting a continuance. *See* R.C.M. 701(g)(3).

One could argue that *Trimper* is distinguishable in that the evidence there involved *uncharged* drug use which rebutted Captain Trimper's assertions of innocence; in the present factual pattern, the testimony of Ms. Brooks went directly to prove the offense charged and was admissible in the government's case-in-chief. We view this distinction as offering no consolation to the appellant. In sum, we find no error.

The Consent Search

The appellant also argues that the military judge committed prejudicial error when she failed to suppress incriminating statements made by the appellant as well as the results of a urinalysis subsequently obtained "without the appellant's voluntary consent." We believe the appellant's assertion of error mixes Fourth Amendment oranges with Fifth Amendment apples. The key to unraveling the matter is not whether an Article 31, 10 U.S.C. § 831, warning was needed but, under the Fourth Amendment, *whether the consent was voluntary. See* Mil.R.Evid. 314(e)(4); *United States v. Roa,* 24 M.J. 297 (C.M.A. 1987); *United States v. Simmons,* 26 M.J. 666 (A.F. C.M.R. 1988). *See also* Saltzburg, Schinasi & Schlueter, *Military Rules of Evidence Manual* 254-255 (2d ed. 1986) and LaFave, *Search and Seizure,* 214-217 (2d ed. 1987). The trial judge's conclusion of voluntary consent will not be disturbed unless unsupported by the evidence of record or clearly erroneous. *United States v. Middleton,* 10 M.J. 123, 133 (C.M.A. 1981) and cases cited. Premised on that standard, we find the military judge ruled correctly.

Individual Defense Counsel

Our attention is invited to the defense claim that the appellant was improperly denied an individual military counsel. We are satisfied that the military judge correctly ruled that no attorney-client relationship had been established with the judge advocate in question and that the individually requested defense counsel was unavailable. *United States v. Gnibus,* 21 M.J. 1, 7 (C.M.A. 1985); *United States v. Wallace,* 14 M.J. 1019, 1022 (A.C.M.R. 1982). *See also United States v. Perry,* 14 M.J. 856, 859 (A.C.M.R. 1982). In addition, our review of the record convinces us that the accused received a vigorous, robust

defense. *See generally United States v. Kelly,* 16 M.J. 244, 248 (C.M.A. 1983).

Testimony by Appellant's Commander

Finally, Sergeant Murphy argues that the judge erred in permitting her commander to testify in regard to rehabilitation. Two separate matters worthy of analysis arose during the testimony of the appellant's squadron commander. First, the commander was asked, "Would you like to have Staff Sergeant Murphy . . . to come back to work for you in the squadron?" The commander responded in the negative. Second, the commander specified that the reason for his negative answer was:

A. . . . because of my [sic] animosity.
Q. Animosity in the squadron?
A. Yes, sir.

Based on this testimony, we first assess whether a commander properly may indicate under *United States v. Ohrt,* 28 M.J. 301 (C.M.A. 1989), whether he wants the individual to come back *into his squadron.* We find this a permissible observation. Here, the commander opined that he didn't want Sergeant Murphy back in his unit; this is substantially different from an impermissible recommendation that she should not be returned to duty anyplace in the Air Force. *See United States v. Ohrt,* 28 M.J. at 305.

As for the other part of his remarks: As we read it, the comment about "animosity" did not violate the caution of *United States v. Horner,* 22 M.J. 294 (C.M.A. 1986); that the commander must base his assessment upon this appellant's character and potential, not simply upon the severity of the offense. Reading this commander's remarks, we are convinced that he was not displaying some sort of ineradicable personal "animosity" against the appellant. To the contrary, he was simply noting that

Sergeant Murphy had blotted her copybook badly in the unit so that others now felt such "animosity" towards her. Because of this, he did not want her returned to duty with his unit. We find such testimony proper. *See United States v. Beno,* 24 M.J. 771 (A.F.C.M.R. 1987).

Order of Witnesses

Our review of this case surfaced another intriguing issue. During the trial, Doctor John Whiting, a defense expert or consultant—the record is unclear as to his precise status—was permitted to sit at the defense table during the testimony of the government's expert as to drug procedures at Brooks Air Force Base, Texas. After this testimony, the prosecution sought to call Doctor Whiting to the stand as its own witness over vigorous defense objections. The military judge granted the prosecution request.

In a very recent case, the Court of Military Appeals has explained the correct procedures with experts in the two categories of *potential witness* and *consultant. See United States v. Turner,* 28 M.J. 487 (C.M.A. 1989). The Court found there that although the prosecution erred in interviewing the defense consultant, there was no reversible error. In the instant case, we cannot tell from the record before us into which of the two categories Dr. Whiting fell. If he was a witness, trial counsel could properly have interviewed him. *See United States v. Turner,* 28 M.J. at 489, n.3. Yet if he was a consultant, trial counsel could not speak with him without defense approval. *Id.* at 488-489.

To be completely fair to the appellant, we will view Doctor Whiting as a consultant—this places him in the most favorable category for the appellant. In light of *Turner* and the numerous cases cited therein, we find no error prejudicial to the rights of the accused. Furthermore, we have

carefully reviewed the testimony of Dr. Whiting and have assured ourselves that there was nothing contained in it which would not have come out in the ordinary course of the court-martial. Accordingly, we find nothing here which provides a basis for vacating the appellant's conviction.

Yet even if Doctor Whiting is seen as a witness who would eventually take the stand for the defense, we view as highly irregular the unorthodox approach of a "preemptive strike" by the prosecutor in calling the witness to the stand before the defense has its own chance to present him. The prosecution claimed its purpose was simply to interview Dr. Whiting under oath. Though we impute no bad faith to the prosecutor, it strikes us that he thereby conceded that he did not know what he might discover. We surmise that a good objection would lie in terms of relevancy and ineffective use of courtroom time. *See* Mil.R.Evid. 611 and Saltzburg, Schinasi & Schlueter, *Military Rules of Evidence Manual* 556-561 (2d ed. 1986) and cases cited. *See also* Mil.R.Evid. 706 and Saltzburg & Redden, *Federal Rules of Evidence Manual* (4th ed. 1986) 709. Finally, there are Constitutional dangers in interfering with the defense team's decision making process. *See United States v. Turner,* 28 M.J. at 489 and *Lange v. Young,* 869 F.2d 1008 (7th Cir. 1989). Accordingly, we suggest that military judges disallow such a "grandstanding" departure from the ordinary and orderly presentation of defense expert witnesses unless there is a clear, convincing need for such innovation.

Sentence Appropriateness

We note the members sentenced the appellant to a bad conduct discharge, two years of confinement, and a reduction to the lowest enlisted grade. We have carefully

considered the numerous matters raised by Sergeant Murphy in extenuation and mitigation both at trial and in post-trial submissions, including the fact that two court members have recommended clemency. We find appropriate only so much of the sentence as extends to a bad conduct discharge, confinement for 15 months, and reduction to airman basic.

We have carefully reviewed the record of trial. The findings of guilty and the sentence, as modified, are correct in law and fact. The findings of guilty and the sentence, as modified, are

AFFIRMED.

Judge BLOMMERS concurs.

Senior Judge LEWIS (concurring/dissenting in part):

I have considerable reservation about the manner in which the issue concerning Tanya Brooks' testimony was handled. I concur in the way the majority has disposed of the issue because I believe it to be consistent with the Court of Military Appeals' guidance in *Trimper*. How we feel about non-disclosure of evidence in Government custody will be guided by how we characterize the underlying issue. In this case, as in *Trimper,* we can take some comfort from the fact that the appellant through her apparently untruthful testimony on the merits set her own trap and cannot now be heard to complain of prejudice. However, there is another way of viewing this situation. The Government, through its nondisclosure, has deprived the appellant of the effective assistance and advice of counsel. Our system contemplates that the defense will be made aware of those evidentiary cards held by the prosecution which it might reasonably expect to play during the course of trial. When material information is withheld,

the defense attorney simply cannot provide adequate advice on the often critical matter of whether an accused should testify on the merits or forego that opportunity in the face of almost certain devastating impeachment or rebuttal. Once an accused has committed to a course of action destined to brand him or her as a liar before the triers of fact, all the continuances in the world are not going to provide any relief.

While I agree that apparent perjury should not be rewarded, I would prefer that we craft a rule which would more strongly reinforce full disclosure. I believe that vigorous enforcement of such rule would discourage perjured testimony, which, in my view, is preferable to exposing it after the fact. Our trial advocates understand their responsibility for attempting to prevent it before the fact. I am certain they will police the aspect of our practice to the utmost of their ability.

I would not reduce the sentence imposed by the members in this case. A short time ago I would have joined the majority in this respect in light of the fact that the appellant stands convicted of a one time use of cocaine and has presented truly impressive mitigation. The times are changing. Trial counsel have spent a good portion of the past decade urging members in drug-related cases to "send a message." This era has about receded into history. Those who have failed to heed the message can expect to face a new reality. I suggest that this case may represent one of this Court's final acts of grace in a cocaine abuse case for some time to come.